TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 6

H. L. MOSHER, PETITIONER,

vs.

CITY OF PHŒNIX

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 23, 1932

CERTIORARI GRANTED APRIL 11, 1932

(36,537)

(36,537)

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

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In the District Court of the United States, District of Arizona.

IN EQUITY No. 189—PHX.

H. L. MOSHER,

Plaintiff,

vs.

CITY OF PHOENIX,

Defendant.

COMPLAINT.

The plaintiff H. L. Mosher, a citizen and resident of Maricopa County, Arizona, by John W. Ray and Joseph C. Niles, attorneys, complain of the defend-

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*Page-number appearing at the foot of page of original certified Transcript of Record.

ant City of Phoenix, a municipal corporation, organized and existing in the county of Maricopa, State of Arizona, under and by authority of the Constitution of the State of Arizona and a charter duly adopted by a vote of its inhabitants, having more than three thousand five hundred inhabitants, and its approval by the Governor, and for cause of action plaintiff says:

I.

That she is the owner and in the possession of the following real estate in the City of Phoenix, Arizona, described as follows:

> Beginning at a point located thirty-three (33) feet East of the quarter or midsection line between the Southwest and the Southeast quarters of section five (5) township one (1) North, range three (3) east, G. & S. R. base and meridian, and being seven hundred forty-five (745) feet North of the section line between sections five (5) and eight (8) same township and range, and forty-eight (48) feet South of the North line of what is now known as Taylor street, in the city of Phoenix, Arizona, thence South and parallel with and thirty-three feet east of said midsection line, three hundred fifty-two (352) feet; thence East and at right angles three hundred five and eight-tenths (305.8) feet; thence North, and parallel with the first line, three hundred and fifty-three (353) feet; thence West three hundred five and forty-two one hundredths (305.42) feet to the place of beginning,

That such right, title and interest is by regular conveyances of record deducible from the United States and is absolute and exclusive of any right, title, interest or claim of the defendant City of Phoenix.

II.

That on or about September 12th, 1928, the City Commission, being the legislative authority of the city of the City of Phoenix attempted to pass and enact an ordinance adopting plans for the improvement and paving of Taylor Street from Central Avenue Eastward to Seventh Street, and on the same day and date attempted to pass and enact a resolution of intention number 5222 declaring the intention of the City to improve the said Taylor Street as aforesaid with bitulithic on bituminous concrete base pavement as per specifications number 25AA, said to be on file with the City Superintendent of Streets of the City of Phoenix, and its intention to proceed under the provisions of a certain statute of the State of Arizona, known as the Bond Act of 1919, and all amendments thereto, which said act if valid and applicable or may be thus applied to the City of Phoenix, provides that such ordered improvements, if and when so made, shall be at the cost of and chargeable to the property in an assessment district to be designated by the legislative authority ordering the improvement, and that improvement bonds may be issued by the city authority, the same to be a charge against the property in such assessment district and a lien thereon, in proportion to some apportionment to be made according to benefits received by the property.

Plaintiff says that said pretended ordinance and said resolution of intention number 5222 as aforesaid are not the law of the City of Phoenix, and neither of such gives any authority to any person to do any act and confers no power on the city authority, or any officer thereof to do any act or thing for the reason that neither of such ordinance or resolution was enacted or passed in accordance with the provisions of law, or the Constitution of the State of Arizona, among other deficiencies, in the following particulars: Sections 12, 13 and 14 of subdivision 2 of Article IV of the Constitution of the state were wholly and totally disregarded and were not in any way complied with; that is to say, that section 12 provides that every bill [5] shall be read by sections on three different days, unless . . . but the reading of a bill by sections on its final passage shall in no case be dispensed with, . . . ; that the said ordinance and the said resolution of intention was not read on three different days, nor was the reading of same dispensed with, nor was either of said measures before the City Commission of the City of Phoenix, the legislative body of such city, on three different days; on the contrary, the said measures were both introduced into the body on the said 12th day of September, 1928, and was on the same day of its introduction, without being read at all and without being read by section on its final passage, placed before the members to be voted on and the same were thus voted on and declared passed and enacted; and that is to say, that section 13 above provides that every act shall embrace but one subject and matters properly

connected therewith, which shall be expressed in the title; that this section was violated in that more than one subject was expressed in the title and more than the subject set out in the title is included in the body of the acts and in each of them; and that is to say, that section 14 provides that no act or section shall be revised or amended by mere reference to the title of such act, but the act or section as amended shall be set forth and published at full length; that the said pretended ordinance and said resolution of intention number 5222, proposes to revise or amend existing ordinances and resolutions and to enact legislation that will if valid place a lien on the property of the citizen and property holder, by mere reference to some act of the state legislature or to several acts of the state legislature by title of the original act, or by reference to article and chapter of the original act and then by adding and all amendments thereto, without even a reference as to what if any amendments had been made, or the purport of such amendments, or the substance of such amendments, or where such amendments may be found; nor is the law as finally proposed to be enacted set out and published at full length; that by said ordinance and resolution, aforesaid, reference is made to some other document or paper, said to be on file in some office in the city and which document is declared to be made a part of such ordinance and a part [6] of such resolution, without being set out and published in full therein, or at all.

Further, that said ordinance and resolution never became a law of the City of Phoenix for the reason that same was never published as required by the

city charter section 14 of chapter IV, which provides that all ordinances and resolutions having the effect of ordinances, or required to be published, shall be published at least once in the official newspaper of the city and a copy thereof posted on a bulletin board in front of the city hall before they become effective or operative; that such ordinance and resolution was not published at all in any publication, nor was a copy of same posted on bulletin-board in front of the city hall or at all, that contained the said ordinance or resolution in full as adopted, in this that the said exhibits, plats, plans, maps and laws of the State of Arizona, and the amendments to such laws, that were referred to and made a part thereof, were never published at all in any way or manner, either in a paper or on a bulletin-board; that the said ordinance was never published at all in any paper, official or otherwise, in any form or manner; that the resolution was not published in any issue of any official newspaper of the city; that there was no official newspaper of the city at that date duly adopted as required and provided for in the charter.

So, for the reasons above set forth, the plaintiff says that said ordinance and said resolution of intention number 5222 is not the law of the City of Phoenix, and gave no authority to any person to do any act or thing thereunder.

III.

Plaintiff says that if she be misinformed and mistaken as to the law, and that it be held as matter of law that the said ordinance and resolution were both duly enacted, and were in fact published in ac-

cordance with the requirements of the law, that then and in that event, plaintiff says that same and each became such law only after (30) thirty days after September 12th, 1928, that is not prior to October 12th, 1928, as provided by section 14 of article IV of the charter of the city, which provides that no ordinance, resolution or franchise shall take effect and become operative until thirty 30 days after [7] its passage by the Commission and approval by the mayor, yet, plaintiff says that prior to October 12th, 1928, the City Commission and the City Engineer of the defendant city, pretending to be acting under such resolution of intention, held, decided and determined that the protests that had then been presented and filed with the city clerk, protesting said proposed work of improvement and the proposed assessment district *district,* were insufficient, and thereafter on November 14th, 1928, the City Commission again attempted to pass a resolution, being number 5271, ordering the work on such proposed improvement on East Taylor Street to proceed, and directing notice of bids to be given for such work by the City Superintendent of Streets, although by the provisions of the city charter, section three of chapter XIX, it is required that the Manager shall advertise for bids for such work, and shall contract for such work; that such resolution number 5271 was not read by section on three different days, nor on its final passage, nor was same before the said legislative body on three different days, nor was that provision of the state Constitution dispensed with by any vote of the membership; that before the same could or did become a law, that is to say on Novem-

ber 28th, 1928, bids were received for such proposed work and a contract was awarded to a bidder, by the City Superintendent of Streets, although by the provision of the city charter section (3) three of chapter XIX, it is provided that such contracts and all contracts of the city shall be made by the Manager in the name of the City of Phoenix; that such resolution number 5271 was never published in the official newspaper at all, and for lack of such publication has never become a law, or binding on any person, nor does it give authority to any person to do any act thereunder.

IV.

Plaintiff says that in the platting of Churchill's addition to the City of Phoenix, by the owners of the lands therein embraced, but who were not this plaintiff, nor any predecessor in title of plaintiff's, nor is plaintiff's said above-described land within said *Chuchhilss* addition to the City of Phoenix, that Taylor Street was laid out and platted as being forty-eight (48) feet wide [8] and extending to the outside boundary of the owner of such proposed subdivision, and outside the boundary of any lands ever owned or claimed by this plaintiff or her predecessors in title to the land herein first described; that notwithstanding that Taylor Street as platted and dedicated is only of the width of forty-eight (48) feet from Central Avenue East, and that only to such width has the City of Phoenix ever any power or jurisdiction, or right or claim of right as a street, that the plats and plans and specifications made and prepared and said to be on file with the City Engineer, and are referred to and attempted to

be made a part of the said ordinance and resolution number 5222, above set out, show that said street is sixty feet in width at all points East of Central Avenue, and the city authority is asserting and claiming and attempting to provide for the improvement of and contracting for the paving of a portion of plaintiff's property that lies along, adjacent and just south of the south line of Taylor Street and forty-eight (48) feet south of the north line of Taylor Street; that is to say, a strip of land along the north side of plaintiff's property from Central Avenue to so-called First Street with a width of approximately twelve feet on Central Avenue and approximately thirteen feet on the so-called First Street, with a length of three hundred and five and a fraction feet, and of the value of more than Twenty-five Thousand Dollars; that the defendant City of Phoenix, by its said action in so providing for the improvement of that portion of plaintiff's property as being a portion of Taylor Street, and in contracting for the improvement of same and in providing by its acts, ordinances and resolutions as aforesaid, that the same shall be improved as a street and incorporated in the boundary of said Taylor Street, and by providing that the remainder of plaintiff's property hereinabove described be included in an assessment district and that the costs of improving such Taylor Street, including the lands of plaintiff as a portion of Taylor Street, be assessed against the property in such assessment district, including plaintiff's property, that the City of Phoenix, defendant herein is attempting to take and appropriate the property of plaintiff without compensation, and to take and appropriate

and use same and deprive the said plaintiff of the permanent use thereof without due process of law, or any [9] process of law, and in violation of common right and in violation of the rights of plaintiff as guaranteed her under the Constitution of the United States and particularly under amendments five and fourteen thereof, which plaintiff here and now pleads and relies on for her protection against the wrongs and threatened wrongs of the defendant city, in the proposed taking of her property as hereinbefore described. That the taking herein complained of is the appropriation of the property of the plaintiff for use as a public street and thereby depriving her of the right of private ownership and use and occupation *od* same as private property, as well as the assessment against her remaining property of the costs of improving Taylor Street as shown on the map and plat and under the specifications said to be on file in the office of the Superintendent of Streets of the city, which map and plat and specifications includes the property of plaintiff as part of Taylor Street to be improved. That such use and appropriation of that part of plaintiff's property for and as Taylor Street would, of necessity, deprive plaintiff of the use, occupation and right incident to private ownership thereof, as well as of the exclusive possession thereof.

V.

That the value of the land that is threatened to be appropriated and used as a part of Taylor Street, which is the private property of plaintiff, as above set out and described is of the value of more than

Twenty-five Thousand Dollars, and that the proposed assessment and tax that is proposed and ordered to be levied and assessed and a lien against plaintiff's property as her share of the proposed improvement of Taylor Street amounts to more than four thousand dollars, so that the amount and value of the thing in controversy herein is largely more than three thousand dollars.

VI.

Plaintiff says that each and all the legislative acts of the legislative body of the defendant city as here above set out and complained of herein is and are void and violative of the Constitution of the State of Arizona, and particularly of section 9 of article IX thereof, subject, Public Debt, Revenue and Taxation, and which provides: [10] "Every law which imposes, continues or revises a tax shall distinctly state the tax and the objects for which it shall be applied; and it shall not be sufficient to refer to any other law to fix such tax or object."

That the ordinances and resolutions above complained of herein is insufficient and not in compliance with this constitutional mandate, and in violation thereof, for the reason that therein is express reference made to another law of the State of Arizona as a part thereof, and also to resolution number 5222 to fix the tax and the purposes and objects of the tax.

VII.

Plaintiff says that the ordinances and resolutions herein above complained of are invalid in that they and each of them, if otherwise legally

enacted, would and does deprive the plaintiff and other interested property taxpayers of the City of Phoenix of the right, reserved by the Constitution out of the grant of legislative power to any city or town, to invoke the referendum against such measure, in this, that the legislative act, the acts of 1912 and amendments, the bond act of 1919 and amendments, being state laws applicable to all cities and towns in the state that is subject to legislative enactments and with legislative charters, had been for many years beyond the power of the referendum clause of the Constitution by reason of the lapse of time, and by the reference to such acts and the attempt to have same apply to the City of Phoenix by the resolutions and under the charter of the City of Phoenix, after the time for the invokation of the right of referendum had passed, is a denial of the right of referendum that is reserved by the state Constitution to the voters of every city and town, as to all local or any legislation that its legislative body may enact.

VIII.

Plaintiff says that the defendant city threatens to and will, by its agents, servants, officers and employees, as well as its authorized contractor, as aforesaid, take and appropriate the aforementioned property of the plaintiff, that is the strip along the north side of her property and south of Taylor Street having a width of about twelve feet on one end and thirteen feet on the other end [11] and a length of about three hundred feet and use the same for the purposes of a public

street in the City of Phoenix and will deprive the plaintiff, the owner, of the right to the use and enjoyment thereof and will pave and improve such portion of the plaintiff's property as and according to the plans, plats and specifications that have been prepared by the City Engineer, and will also in addition to the appropriation of that portion of plaintiff's land, assess the costs of such pavement and improvement against the remaining property of the plaintiff adjacent thereto under the pretended authority of the ordinances and resolutions here*a*bove set out and complained of, unless such action and p*ur*posed action by the city be restrained and prevented by the orders and judgment of this court; that by such action of appropriation taking and p*ur*posed use of the lands of the plaintiff in the manner and under the authority of such ordinances, resolutions and acts hereinabove set out and complained of by the defendant city and its officers and agents, the plaintiff will be deprived of her property without due process of law and in violation of her rights under the Constitution of the State of Arizona, and also in violation of her rights under the Constitution of the United States, and particularly the fifth and fourteenth amendments thereto.

That there has been no dedication or deed made to the City of said strip of land, nor has any proceeding in condemnation ever been instituted to take or acquire said land for any purpose, nor has the defendant city any right, title, claim or shadow of claim to same or any interest or easement therein for any purpose or at all.

That the plaintiff has no adequate remedy at law to prevent the wrongs and threatened wrongs complained of done and threatened by the City of Phoenix defendant herein, its officers, agents, servants and employees.

WHEREF*OE*, plaintiff prays that she have a subpoena out of this court to the end that the defendant be required to answer this complaint and plead and disclose its action and proposed action in the premises, but an answer under oath is expressly waived that on hearing plaintiff be granted an injunction and judgment against the defendant, its agents, servants, officers and employees or any person acting under them or by their authority, prohibiting such defendant City of Phoenix, its agents, servants and employees, officers, contractors, [12] or either of them or any person acting under the direction or authority of the defendant city from doing any act or thing under such ordinances and resolutions complained of above in the way of taking, using, appropriating and/or improving the above set out and described property of plaintiff in any way or manner as a street or public way of the City of Phoenix; that she be adjudged to be the owner of such property free from any claim on same or easement in same for the purposes of a street in the city; that the entire legislative proceeding as above complained of in relation to the improvement of said Taylor Street, be declared null and void; that she recover her costs herein and that she have such other and

further relief as may be deemed just and equitable in the premises, and she would ever pray.

JOHN W. RAY,
JOSEPH C. NILES,
Attorneys.

The affiant H. L. Mosher says that she is the plaintiff herein; that she has read the above and foregoing complaint and knows the contents thereof; that the statements therein contained are true, of her own knowledge, except that as to such as are made on information and belief, that as to such statements she believes same are true.

H. L. MOSHER.

Subscribed and sworn to before me by H. L. Mosher May 17, 1929.

[Seal] J. C. NILES,
Notary Public Maricopa County.

My commission expires August 31, 1929.

Filed May 17, 1929. [13]

United States of America.

District Court of the United States, District of Arizona.

IN EQUITY E.-189—PHOENIX.

SUBPOENA.

The President of the United States, GREETING: To City of Phoenix, Phoenix, Arizona, for H. L. Mosher, Plaintiff.

YOU ARE HEREBY COMMANDED, that you be and appear in said District Court of the

United States, District of Arizona, at the courtroom in Phoenix, twenty days from the date of service hereof, to answer a bill of complaint exhibited against you in said court by H. L. Mosher, who is a citizen of the State of Arizona, and to do and receive what the said Court shall have considered in that behalf.

WITNESS, the Honorable F. C. JACOBS, Judge of said District Court, this 17th day of May, in the year of our Lord one thousand nine hundred and 29 and of our Independence the 153d.

[Seal] C. R. McFALL,
Clerk.
By Thos. O. Bishop,
Deputy Clerk.

MEMORANDUM PURSUANT TO RULE 12, RULES OF PRACTICE FOR THE COURTS OF EQUITY OF THE UNITED STATES:

YOU ARE HEREBY REQUIRED to file your answer or other defense in the above suit, on or before the 20th day of after service, excluding the day thereof, of this subpoena, at the Clerk's office of said court pursuant to said bill; otherwise the said bill may be taken *pro confesso.*

C. R. McFALL,
Clerk.
By Thos. O. Bishop,
Deputy Clerk. [14]

RETURN ON SERVICE OF WRIT.

United States of America,
District of Arizona,—ss.

I hereby certify and return that I served the annexed subpoena on the therein named G. H. Todd, City Manager, by handing to and leaving a true and correct copy thereof with him personally at Phoenix in said District on the 20 day of May, A. D. 1929.

G. A. MAUK,
U. S. Marshal.
By A. E. Frankforter,
Deputy.

Filed Jun. 1, 1929. [15]

[Title of Court and Cause.]

MOTION TO DISMISS.

Comes now the City of Phoenix, a municipal corporation, organized and existing in the County of Maricopa, State of Arizona, by its attorneys, and states that the complaint filed herein shows upon its face that this court has no jurisdiction to try the issues thereof.

WHEREFORE, defendant prays the court shall dismiss said complaint and send the defendant hence with its costs.

HENRY J. SULLIVAN,
City Attorney.
AUSTIN O'BRIEN,
WILLIAM C. ELIOT,
Asst. City Attorneys.

Received copy of the above on this 6th day of June, 1929.

J. C. NILES and
JNO. W. RAY.

H.

Filed Jun. 6, 1929. [16]

[Title of Court and Cause.]

April, 1929, Term—At Phoenix.

Minute Entry of Monday, June 10, 1929.

Honorable F. C. JACOBS, United States District Judge, Presiding.

MINUTES OF COURT—JUNE 10, 1929—HEARING ON MOTION TO DISMISS CONTINUED.

Defendant's motion to dismiss comes on regularly for hearing this date.

No appearance being made for either party, IT IS ORDERED that said motion be, and it is hereby, continued for one week. [17]

April, 1929, Term—At Phoenix.

Minute Entry of Monday, June 17, 1929.

Honorable F. C. JACOBS, United States District Judge, Presiding.

[Title of Court and Cause.]

MINUTES OF COURT—JUNE 17, 1929—HEARING ON MOTION TO DISMISS CONTINUED.

Defendant's motion to dismiss comes on regularly for hearing this date.

No appearances being made for either party, IT IS ORDERED that said motion be, and it is hereby, continued for one week. [18]

April, 1929, Term—At Phoenix.

Minute Entry of Monday, June 24, 1929.

Honorable F. C. JACOBS, United States District Judge, Presiding.

[Title of Court and Cause.]

MINUTES OF COURT—JUNE 24, 1929—HEARING ON MOTION TO DISMISS CONTINUED.

Defendant's motion to dismiss comes on regularly for hearing this date.

No appearances being made, IT IS ORDERED that said motion to dismiss be, and the same is, continued for one week. [19]

April, 1929, Term—At Phoenix.

Minute Entry of Monday, July 1, 1929.

Honorable F. C. JACOBS, United States District Judge, Presiding.

[Title of Court and Cause.]

MINUTES OF COURT—JULY 1, 1929—HEARING ON MOTION TO DISMISS CONTINUED.

Defendant's motion to dismiss comes on regularly for hearing this date.

No appearances being made, IT IS ORDERED that said motion to dismiss be, and the same is, continued to the next call of the Law and Motion Calendar. [20]

October, 1929, Term—At Phoenix.

Minute Entry of Monday, October 14, 1929.

Honorable JEREMIAH NETERER, United States District Judge, Specially Assigned, Presiding.

[Title of Court and Cause.]

MINUTES OF COURT—OCTOBER 14, 1929—HEARING ON MOTION TO DISMISS CONTINUED.

Defendant's motion to dismiss comes on regularly this date for hearing. John W. Ray, Esq.,

appears for the plaintiff. No counsel appears for the defendant.

Upon motion of the plaintiff,—

IT IS ORDERED that said motion be continued and reset for hearing October 21st, 1929, at ten o'clock A. M. [21]

October, 1929, Term—At Phoenix.

Minute Entry of Monday, November 4, 1929.

Honorable F. C. JACOBS, United States District Judge, Presiding.

[Title of Court and Cause.]

MINUTES OF COURT—NOVEMBER 4, 1929—ORDER DENYING MOTION TO DISMISS.

Defendant's motion to dismiss comes on regularly this day for hearing. J. W. Ray, Esq., appears as counsel for the plaintiff, and Wm. C. Elliott, Esq., appears as counsel for the defendant. Said motion is now duly argued by respective counsel, and

IT IS ORDERED that said motion be, and the same is hereby, denied, to which ruling and order of the Court, the defendant excepts. [22]

October, 1930, Term—At Phoenix.

Minute Entry of Monday, January 19, 1931.

Honorable F. C. JACOBS, United District Judge, Presiding.

[Title of Court and Cause.]

MINUTES OF COURT—JANUARY 19, 1931—ORDER SUBMITTING MOTION TO DISMISS.

Defendant's motion to dismiss comes on regularly for rehearing this day. No appearance is made on behalf of the plaintiff. J. L. Gust, Esquire, appears for the defendant. On motion of J. L. Gust, Esquire,—

IT IS ORDERED that defendant's motion to dismiss be submitted and by the Court taken under advisement. [23]

October, 1930, Term—At Phoenix.

Minute Entry of Wednesday, April 1, 1931.

Honorable F. C. JACOBS, United States District Judge, Presiding.

[Title of Court and Cause.]

MINUTES OF COURT—APRIL 1, 1931—ORDER GRANTING MOTION TO DISMISS BILL OF COMPLAINT.

IT IS ORDERED that the order heretofore entered herein denying motion of the defendant to

dismiss the bill of complaint, be, and the same is hereby, vacated, and

IT IS FURTHER ORDERED that defendant's motion to dismiss the bill of complaint be granted, on the ground that the United States District Court has no jurisdiction, and that this case be, and the same is hereby, dismissed, to which ruling and order of the Court an exception is entered on behalf of the plaintiff. [24]

[Title of Court and Cause.]

ANSWER.

Comes now the defendant, City of Phoenix, and without waiving its demurrer heretofore filed and submitted, answers as follows:

I.

Defendant denies that the strip of ground twelve (12 ft.) feet wide extending east and west across the northern end of the property described by plaintiff in her complaint belongs to the plaintiff and states that this ground is and has been for thirty years part of Taylor Street and as such was dedicated to public use. As to the remaining allegations in Section I, defendant states that not having sufficient information upon which to form a belief it neither admits nor denies plaintiff's statement that she is the owner of the property described in the first section of said complaint (exclusive of the twelve feet heretofore referred to), and prays that plaintiff be put upon strict proof thereof.

II.

Answering Section II of said complaint, defendant admits that on the 12th day of September, 1928, the City Commission of the City of Phoenix, it being then and there the legislative body of the said City, passed an ordinance adopting plans for improvement and paving of Taylor Street from Central [25] Avenue eastward to Seventh Street, in said city, and on the same date passed a Resolution of Intention No. 5222 declaring the intention of the city to improve said Taylor Street as aforesaid with bitulithic on bituminous concrete base pavement as per specifications Number 25AA, which said specifications are on file with the City Superintendent of Streets of the City of Phoenix and its intention to proceed under the provisions of a certain statute of the State of Arizona known as the "Bond Act of 1919" and all amendments thereto, and that said Act provides that improvements made thereunder shall be at the cost of and chargeable to the property in the assessment district and that improvement bonds may be issued by the City authority, chargeable against said property and a lien thereon in proportion to the benefits received by the said property.

Defendant denies each and every other allegation contained in said section.

III.

Answering Section III of said complaint, defendant denies that said Resolution of Intention No. 5222 was not in effect prior to October 12, 1928, and states that same became a law and was in effect

on and after its passage by the Commission. Defendant admits that prior to October 12, 1928, the City Commission and the City Engineer acting under such Resolution of Intention found that the protests filed against the proposed improvement were insufficient and that on November 14, 1928, the City Commission passed a Resolution being numbered 5271 ordering that the work on such proposed improvement on East Taylor Street should be done and directing notice of bids to be given for such work by the Superintendent of Streets.

Defendant denies that the provisions of the City Charter require that the City Manager shall advertise for bids for such work and shall contract for such work. [26]

Defendant denies that there was any irregularity or illegality in the passage of said Resolution No. 5271 as stated by plaintiff.

Defendant admits that bids were received for such proposed work and a contract awarded to a bidder by the City Superintendent of Streets on November 28, 1928, but denies that said Ordinance was not effective and a law at that date and that the City Manager was required to make said contract in the name of the City.

Defendant admits that Resolution No. 5271 was never published in the official newspaper but denies that by reason thereof said Resolution did not become a law.

Defendant denies each and every other allegation contained in said section.

IV.

Answering Section IV of said complaint, defendant admits that the plats on file in the office of the City Engineer show that said Taylor Street is sixty feet in width at all points east of Central Avenue and admits that the cost of improving said Taylor Street will be assessed against the property in the assessment district as stated in the Resolution of Intention heretofore referred to.

Defendant denies each and every other allegation contained in said Section IV.

V.

Answering Section V of said complaint, defendant states that not having sufficient information on which to form a belief, it neither admits nor denies the same but prays that plaintiff be put upon strict proof thereof.

VI.

Answering Section VI of said complaint, defendant denies each and every allegation contained in said section. [27]

VII.

Answering Section VII of said complaint, defendant denies each and every allegation contained in said section.

VIII.

Answering Section VIII of said complaint, defendant admits that it will pave and improve said Taylor Street and use it as and for a public street and will assess the costs of said improvement against the adjacent property including that of plaintiff

unless restrained by this Court and denies each and every other allegation contained in said section.

IX.

For other and further answer and affirmative defense defendant states as follows:

By Resolution No. 5222, the Commission of the City of Phoenix adopted for the purpose of affecting the improvement of Taylor Street, the provisions of the state law contained in Title VII Chapter XIII Revised Statutes, 1913 C. C. and amendments thereto, except that for the issuance of the improvement bonds therewith provided for by said Resolution the Commission adopted the general state law contained in Chapter 144 of the Session Laws of the State of Arizona, 1919, known as the "Bond Act of 1919" and amendments thereto, and that each and every thing required by these laws has been properly done.

X.

Further answering, defendant states that Taylor Street is a public thoroughfare running East and West from Central Avenue to 7th Street within the City of Phoenix and that for a period of more than thirty (30) years the public has used and occupied Taylor Street with the full knowledge and consent of the plaintiff and her predecessors in interest as a public highway or street of the town or City of Phoenix [28] and that the City of Phoenix and its predecessors have been in open, notorious, adverse and exclusive possession and control of the said Taylor Street mentioned in plaintiff's com-

plaint and in Resolution of Intention No. 5222, the same being devoted and dedicated to public use and that more than 20 years prior to the institution of this action and prior to the passage of Resolution No. 5222 mentioned in plaintiff's complaint the said Taylor Street mentioned and described in plaintiff's complaint and in said Resolution of Intention had been dedicated to the public use as a public highway and street of the City of Phoenix, which dedication was duly accepted by the public and the City of Phoenix and its predecessors in interest. And that said Taylor Street during all of said times is and has been a public street of the City of Phoenix, in continuous use by the public as such and that the plaintiff herein and her predecessors in interest have not been the owners of nor have they, or either of them, been in possession of said Taylor Street at any time during the period of more than (20) twenty years before the commencement of this suit, and that the said plaintiff and her predecessors in interest are barred and estopped by their acknowledgment and consent to the use by the public of said Taylor Street as a public highway and by their consent and permission of the City of Phoenix to occupy, control and improve said Taylor Street for more than a period of twenty (20) years prior to the commencement of this suit; that the said plaintiff and her predecessors in interest are estopped and barred from asserting or claiming any interest in and to Taylor Street in that said plaintiff and her predecessors in interest had long prior to September 7th, 1898, platted and dedicated

to public use as a public way or street of the City of Phoenix said Taylor Street, which was on said date being used by the public as a public street or thoroughfare of the [29] said City of Phoenix, and on said date the Common Council of the City of Phoenix passed Ordinance number 275, adopted a certain plat as the Official Plat of Churchill Addition, in which plat was included the property mentioned in this action and in Resolution of Intention No. 5222 and in which Ordinance adopting said plat there was shown public streets and ways thereon and the same were by the Common Council of the City of Phoenix declared to be public ways and streets and dedicated to public use, subject to the exclusive control and management of the Common Council of the City of Phoenix, and that by said Ordinance the position, location, width and length of all streets, avenues, alleys and public ways or places were declared to be correctly shown upon said Official Plat, and that said Taylor Streets was one of the streets shown upon said plat and dedicated in said Ordinance and has at all times since said date and for a period of more than twenty (20) years prior to the bringing of this action been recognized and so accepted by the plaintiff herein, her predecessors in interest and the general public as a public street of the City of Phoenix.

WHEREFORE, having fully answered, defendant prays judgment for its costs herein and that plaintiff take nothing in her said action and that

this defendant be awarded such further relief as in equity and law it is entitled to.

HENRY J. SULLIVAN,
AUSTIN O'BRIEN,
WILLIAM C. ELIOT,
Attorneys for Defendant.

State of Arizona,
County of Maricopa,—ss.

Joseph C. Furst, being first duly sworn upon oath deposes and says that he is the City Clerk of the City of Phoenix, defendant in the above-entitled action and makes this [30] affidavit for and on behalf of said City of Phoenix. That he has read the answer and knows the contents thereof and that all the allegations and denials therein contained are true of this affiant's own knowledge in substance and in fact.

This affiant further upon oath says, that he has read the plaintiff's complaint in the above-entitled action and knows the contents thereof and that the allegations therein contained, which are in the foregoing answer denied, are untrue in substance and in fact of this affiant's own knowledge.

JOSEPH C. FURST,
Affiant.

Subscribed and sworn to before me this 10th day of January, 1930.

My commission expires: Oct. 1st, 1933.

[Seal] WALTER DAVIS, Jr.,
Notary Public.

Service of the within instrument accepted this 10th day of January, 1930.

J. C. NILES,
JNO. W. RAY,
Attorneys for Plaintiff.

Filed Jan. 11, 1930. [31]

[Title of Court and Cause.]

MOTION TO REQUIRE DEFENDANT TO MAKE ANSWER MORE DEFINITE AND CERTAIN.

Comes now the plaintiff H. L. Mosher by attorneys and moves the court to require the defendant to make its answer more definite and certain in this:

That defendant be required to plead the width of the street (Taylor) that it pleads was dedicated by the former owner; also the width of the street the defendant claims by user and prescription (that is Taylor Street); the reason this specification is asked is that plaintiff concedes that Taylor Street was dedicated by the owner of the realty to the width of forty-eight (48) feet on the North, which owner was not the predecessor in title to plaintiff; and she admits the width of Taylor Street to be forty-eight feet (48) on the North, but the controversy exists over the additional twelve (12) feet on the South that the defendant seeks by this proceeding to require pavement over a width of sixty (60) feet, instead of forty-eight (48) feet, and the

answer does not state the width of the dedicated street, nor the width of the street claimed by user or prescription by the defendant. The statements of the answer may be literally true, if reference be made to a street forty-eight (48) feet in width, but untrue if reference be made to Taylor Street as sixty (60) feet in width.

Upon this motion plaintiff asks the judgment of the court.

JOHN W. RAY,
JOSEPH C. NILES,
For Plaintiff.

Rec'd copy this 22d day of January, 1930.
HENRY J. SULLIVAN.
AUSTIN O'BRIEN.
WILLIAM C. ELIOT. [32]

Filed Jan. 22, 1930. [33]

October, 1929, Term—At Phoenix.

Minute Entry of Monday, January 27, 1930.

Honorable F. C. JACOBS, United States District Judge, Presiding.

[Title of Court and Cause.]

MINUTES OF COURT—JANUARY 27, 1930—ORDER GRANTING TIME TO AMEND ANSWER.

Plaintiff's motion to require defendant to make answer more definite and certain comes on regularly

for hearing this day. John W. Ray, Esq., appears as counsel for the plaintiff. Wm. C. Elliot, Esq., appears for the defendant. Said motion is now duly argued by respective counsel, and

IT IS ORDERED that said motion be and the same is hereby granted and that the defendant be allowed ten days from and after this date to amend its answer. [34]

[Title of Court and Cause.]

AMENDED ANSWER.

Comes now the defendant, City of Phoenix, and without waiving its demurrer heretofore filed and submitted, answers as follows:

I.

Defendant denies that the strip of ground twelve (12 ft.) feet wide extending east and west across the northern end of the property described by plaintiff in her complaint belongs to the plaintiff and states that this ground is and has been for thirty years part of Taylor Street and as such was dedicated to public use. As to the remaining allegations in Section I, defendant states that not having sufficient information upon which to form a belief it neither admits nor denies plaintiff's statement that she is the owner of the property described in the first section of said complaint (exclusive of the twelve feet heretofore referred to), and prays that plaintiff be put upon strict proof thereof.

II.

Answering Section II of said complaint, defendant admits that on the 12th day of September, 1928, the City Commission of the City of Phoenix, it being then and there the legislative body of the said city, passed an ordinance adopting plans for improvement and paving of Taylor Street from Central [35] Avenue eastward to Seventh Street, in said city and on the same date passed a Resolution of Intention No. 5222 declaring the intention of the city to improve said Taylor Street as aforesaid with bitulithic and bituminous concrete base pavement as per specifications Number 25AA which said specifications are on file with the City Superintendent of Streets of the City of Phoenix and its intention to proceed under the provisions of a certain statute of the State of Arizona known as the "Bond Act of 1919" and all amendments thereto, and that said Act provides that improvements made thereunder shall be at the cost of and chargeable to the property in the assessment district and that improvement bonds may be issued by the city authority, chargeable against said property and a lien thereon in proportion to the benefits received by the said property.

Defendant denies each and every other allegation contained in said section.

III.

Answering Section III of said complaint, defendant denies that said Resolution of Intention No. 5222 was not in effect prior to October 12, 1928, and

states that same became a law and was in effect on and after its passage by the Commission. Defendant admits that prior to October 12, 1928, the City Commission and the City Engineer acting under such Resolution of Intention found that the protests filed against the proposed improvement were insufficient and that on November 14, 1928, the City Commission passed a Resolution being numbered 5271 ordering that the work on such proposed improvement on East Taylor Street should be done and directing notice of bids to be given for such work by the Superintendent of Streets.

Defendant denies that the provisions of the City Charter require that the City Manager shall advertise for [36] bids for such work and shall contract for such work.

Defendant denies that there was any irregularity or illegality in the passage of said Resolution No. 5271 as stated by plaintiff.

Defendant admits that bids were received for such proposed work and a contract awarded to a bidder by the City Superintendent of Streets on November 28, 1928, but denies that said ordinance was not effective and a law at that date and that the City Mnaager was required to make said contract in the name of the city.

Defendant admits that Resolution No. 5271 was never published in the official newspaper but denies that by reason thereof said Resolution did not become a law.

Defendant denies each and every other allegation contained in said section.

IV.

Answering Section IV of said complaint, defendant admits that the plats on file in the office of the City Engineer show that said Taylor Street is Sixty and Eight-tenths (60.08 ft.) in width at all points east of Central Avenue and admits that the cost of improving said Taylor Street will be assessed against the property in the assessment district as stated in the Resolution of Intention heretofore referred to.

Defendant denies each and every other allegation contained in said Section IV.

V.

Answering Section V of said complaint, defendant states that not having sufficient information on which to form a belief, it neither admits nor denies the same but prays that plaintiff be put upon strict proof thereof.

VI.

Answering Section VI of said complaint, defendant [37] denies each and every allegation contained in said section.

VII.

Answering Section VII of said complaint, defendant denies each and every allegation contained in said section.

VIII.

Answering Section VIII of said complaint, defendant admits that it will pave and improve said Taylor Street and use it as and for a public street and will assess the costs of said improvement against the adjacent property including that of plaintiff

unless restrained by the court and denies each and every other allegation contained in said section.

IX.

For other and further answer and affirmative defense defendant states as follows:

By Resolution No. 5222, the Commission of the City of Phoenix adopted for the purpose of affecting the improvement of Taylor Street, the provisions of the state law contained in Title VII, Chapter XIII, Revised Statutes, 1913 C. C., and amendments thereto, and that for the issuance of the improvement bonds provided for by said Resolution the Commission adopted the general state law contained in Chapter 144 of the Session Laws of the State of Arizona, 1919, known as the "Bond Act of 1919," and amendments thereto, and that each and every thing required by these laws has been properly done.

X.

Further answering defendant states that Taylor Street is a public thoroughfare Sixty and Eight One-hundredths ft. (60.08 ft.) wide running east and west from Central Avenue to 7th Street within the City of Phoenix; that for a period of more than 30 years the public has occupied said Taylor Street with the full knowledge and consent of the said plaintiff and her predecessors in interest as a public highway or street of the town or City of Phoenix; that said plaintiff [38] and her predecessors in interest are barred and estopped from asserting any right, title or interest in said Taylor Street (60.08 ft. wide) by their knowledge and

consent to the use of same as a public way and by their consent and permission to the City of Phoenix to occupy, control and improve said Taylor Street for a period of more than Twenty (20) years prior to the commencement of this suit; that for a period of more than thirty (30) years the City of Phoenix and its predecessors have been in open, notorious, adverse and exclusive possession and control of said Taylor Street, mentioned in plaintiff's complaint and in Resolution Number 5222, the same for its full width of Sixty and Eight One-hundredths (60.08) feet being devoted and dedicated to public use as a public street; that more than twenty years (20) prior to the institution of this action and prior to the passage of Resolution No. 5222 mentioned in plaintiff's complaint the said Taylor Street mentioned and described in plaintiff's complaint and in said Resolution of Intention had been dedicated to the public use as a public highway and street of the City of Phoenix, which dedication was duly accepted by the public and the City of Phoenix and its predecessors in interest; that said Taylor Street for its full width of Sixty and Eight One-hundredths (60.08 ft.) feet is and during all the times hereinbefore mentioned has been a public street of the City of Phoenix in continuous use by the public as such and that plaintiff herein and her predecessors in interest have not been the owners of nor have they or any of them been in possession of said Taylor Street or any part thereof at any time during a period of more than 20 years before the commencement of this suit.

XI.

For further defense defendant states that plaintiff and her predecessors in interest are estopped and barred from asserting any right, title or interest in and to said [39] Taylor Street (60.08 ft. wide) or any part thereof by certain deeds, mortgages and conveyances wherein they have recognized the existence of Taylor Street and the boundaries thereof.

XII.

For further defense defendant states that plaintiff and her predecessors in interest are estopped and barred from asserting any right, title and interest in the said Taylor Street in that said plaintiff and her predecessors in interest had long prior to September 7, 1898, acquiesced and assented to the platting and dedication to public use as a public way or street of the City of Phoenix said Taylor Street (60.08 ft. wide) which was on said date being used by the public as a public street or thoroughfare of the City of Phoenix; that on Sept. 7, 1898, the Common Council of the City of Phoenix passed Ordinance No. 275 adopting a certain plat as the official plat of Churchill Addition, in which plat was included the property mentioned in this action and in Resolution of Intention No. 5222; that on said plat was shown public streets and ways, among them Taylor Street, which was shown to be 60.08 feet wide and that the same were by the Common Council of the City of Phoenix by said Ordinance Number 275 declared to be public ways and streets and dedicated to public use, subject to the exclusive

control and management of the Common Council of the City of Phoenix; that by said Ordinance Number 275 the position, location, width and length of all streets, avenues, alleys and public ways or places were declared to be correctly shown upon said official plat; that said Taylor Street was one of the streets shown upon said plat and dedicated to public use by said ordinance and has at all times since said date and for a period of more than twenty (20) years prior to the bringing of this action been recognized and accepted by plaintiff herein, her predecessors in interest and the general public as a public street of the City of Phoenix; [40] and that by all of said reasons the plaintiff herein is estopped from now asserting any claim to any part thereof.

WHEREFORE, having fully answered, defendant prays judgment for its costs herein and that plaintiff take nothing in her said action and that this defendant be awarded such further relief as in equity and law it is entitled to.

HENRY J. SULLIVAN,
AUSTIN O'BRIEN,
WILLIAM C. ELIOT,
Attorneys for Defendant.

State of Arizona,
County of Maricopa,—ss.

Joseph C. Furst, being first duly sworn upon oath, deposes and says that he is the City Clerk of the City of Phoenix, defendant in the above-entitled action and makes this affidavit for and on behalf of said City of Phoenix. That he has read the an-

swer and knows the contents thereof and that all the allegations and denials therein contained are true of this affiant's own knowledge in substance and in fact.

This affiant further upon oath says, that he has read the plaintiff's complaint in the above-entitled action and knows the contents thereof and that the allegations therein contained, which are in the foregoing answer denied, are untrue in substance and in fact of this affiant's own knowledge.

GEO. H. TODD,
Affiant.

Subscribed and sworn to before me this 11th day of February, 1930.

[Seal] THOS. P. JOHNSON,
Notary Public.

My commission expires:
My commission expires January 21, 1934.

Received copy this answer Feby. 11/30.

JNO. W. RAY,
Atty. for Ptff.

Filed Feb. 11, 1930. [41]

[Title of Court and Cause.]

NOTICE AND MOTION TO SET CASE FOR TRIAL.

To H. L. Mosher and John W. Ray and J. C. Niles, Her Attorneys:

You will please take notice that the defendant

will, on the 31st day of March, 1930, at the hour of 10 o'clock A. M., move the court for an order setting the above-entitled cause for trial and naming the date thereof.

HENRY J. SULLIVAN,
AUSTIN O'BRIEN,
WILLIAM C. ELLIOT,
Attorneys for Defendant City of Phoenix.

MOTION FOR TRIAL.

Comes now the attorneys for the defendant, City of Phoenix, in the above-entitled cause, and move the court for an order setting the above-entitled cause for trial.

HENRY J. SULLIVAN,
AUSTIN O'BRIEN,
WILLIAM C. ELLIOT,
Attorneys for Defendant City of Phoenix.

Service of the within instrument accepted this 26th day of March, 1930.

J. C. NILES,
Attorney for Plaintiff.

Filed Mar. 26, 1930. [42]

April, 1930, Term—At Phoenix.

Minute Entry of Monday, April 7, 1930.

Honorable F. C. JACOBS, United States District Judge, Presiding.

[Title of Court and Cause.]

MINUTES OF COURT—APRIL 7, 1930—HEARING ON MOTION TO SET CASE FOR TRIAL CONTINUED.

Defendant's motion to set this case for trial comes on regularly for hearing this day. No appearance being made,—

IT IS ORDERED that said motion to set this case for trial be continued and reset for hearing Monday, April 14, 1930, at the hour of ten o'clock A. M. [42-A]

April, 1930, Term—At Phoenix.

Minute Entry of Monday, April 14, 1930.

Honorable F. C. JACOBS, United States District Judge, Presiding.

[Title of Court and Cause.]

MINUTES OF COURT—APRIL 14, 1930—ORDER STRIKING MOTION TO SET CASE FOR TRIAL.

Defendant's motion to set this case for trial comes on regularly for hearing this day. No appearance

is made for the plaintiff; William C. Eliot, Esquire, appears for the defendant. On motion of counsel for defendant,—

IT IS ORDERED that said defendant's motion to set this case for trial be stricken from the Law and Motion Calendar, to be reinstated upon stipulation of counsel and order of Court. [43]

[Title of Court and Cause.]

REPLY.

The plaintiff for reply to the answer of the defendant and to such parts thereof as she is advised to respond to says:

She denies that she, or any predecessor in title or any person with whom she is in privity of title, ever at any time or at all in any way dedicated the strip of land twelve feet in width on the south side of Taylor Street and here in controversy to the city for a street, or to any public use, or to any use at all; denies that said strip of land has been, or is now or ever has been in the peaceable, adverse possession of the city for public use, or use as a street or public thorofare, or in the possession of the city for any purpose or for any length of time whatever; denies that the same has ever been improved or used by the city as a street or public way or at all for any purpose; denies as a matter of law that the city can obtain the right or easement to use private property as a public way or street by user, or by use.

Plaintiff says that said twelve feet of land on the south side of Taylor Street and the same here in controversy has never by any legal action, or authority or resolution of any lawful body been taken or condemned, or has it been created or designated as a public way or street in the City of Phoenix, nor as road or highway in the county of Maricopa and that without such action by some tribunal or body acting under the law and within its jurisdiction such land cannot be or become a public way, or road or street.

That long ago it was held and decided by the supreme judicial tribunal authority of the state and territory of the state and territory of Arizona in the case of Territory vs. Richardson, reported in 8 Arizona, 336, and again reaffirmed in Tucson Con. Copper Co. vs. Reese, 12 Arizona, 226, that "We have no statute in this territory which recognizes that a public road or highway [44] may be established by adverse user or by prescription," and thereby held that formal legal proceedings as provided by Statute was necessary to the establishment of a public highway and that no other way was provided, and that unless such legal proceedings were had and of record there was no public highway, and by this decision and ruling by the highest state court as to the law of the state the same has become *stare decisis* and a rule of property and property rights and any property owner might under such ruling and decision, long held to and unreversed or changed, ignore any use of his property by the public or by any person for any length of

time, if such had been, with the knowledge and assurance, relying on the opinion of the highest state judicial authority, that such use would never ripen into a right, or an appropriation of his property as a public highway or public way. That such ruling and decision and holding of the highest court in the state and territory of Arizona is the law of the land and was within the knowledge of the owners of this land and of the city authorities for all these years, when it is alleged that the city acquired a right to the said strip as a part of the city street by user and by prescription.

WHEREFORE, having answered the affirmative matter in the answer contained the plaintiff prays as in her original petition.

H. L. MOSHER.

By JOHN W. RAY and
J. C. NILES,
Attys.

Received copy of written reply this 27th day of March, 1930.

WILLIAM C. ELIOT,
Atty. for Defendant.

Filed Mar. 27, 1930. [45]

[Title of Court and Cause.]

PETITION FOR APPEAL.

The plaintiff H. L. Mosher feeling herself aggrieved by the judgment and decree of the court rendered April 2d, 1931, dismissing this cause for

want of jurisdiction in this court on motion therefor duly made by the defendant, presents this her petition praying this court to allow an appeal from such judgment and decree, and to fix such bond for costs of such appeal as may, in its judgment seem right and proper in the premises.

Assignments of error are filed herewith.

JOHN W. RAY,
Attorney for Plaintiff.

Received copy this 7th day of April, 1931.
KIBBEY, BENNETT, GUST, SMITH & ROSENFELD,
F.,
Attorneys for Defendants.

Filed Apr. 7, 1931. [46]

[Title of Court and Cause.]

ASSIGNMENT OF ERROR.

The plaintiff herein by John W. Ray, attorney, assigns as error the action of the trial court in its judgment and decree of dismissal, the following:

(1) The court erred in sustaining the motion to dismiss for want of jurisdi*sctio.*

(2) The court erred in holding and deciding that the petition herein did not present for determination any question arising under the Constitution or laws of the United States, or otherwise, within the jurisdiction of the Federal Courts.

(3) The court erred in holding and deciding that the action of the defendant city, by its legislative

body, in ordering the improvement of the street named in the resolution did not undertake to deprive plaintiff of her property without due process of law and without compensation made and provided.

Upon these assignments of error the plaintiff will rely for a reversal of the judgment and decree and will ask the Circuit Court of Appeals to render such judgment and decree in the premises as may seem just and right.

JOHN W. RAY,
Attorney for Plaintiff.

Received copy of the above assignment of error, April 7th, 1931.

KIBBEY, BENNETT, GUST, SMITH & ROSENFELD,
Attorneys for Defendants.

Filed Apr. 7, 1931. [47]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL AND FIXING COST BOND.

Upon consideration of plaintiff's petition for allowance of an appeal herein, IT IS ORDERED that an appeal to the Circuit Court of Appeals for the Ninth Circuit from the decree filed and entered herein be and the same is hereby allowed and that a certified transcript of the record and all proceedings be forthwith transmitted to the said Circuit Court of Appeals at San Francisco.

And it is further ordered that cost bond on appeal be fixed at the sum of Two Hundred Fifty ($250.00) Dollars, and that the same may be approved by the Clerk of this court.

Dated this April 8th, 1931.

F. C. JACOBS,
Judge U. S. Dist. Court.

Received copy this 7th day of April, 1931.
KIBBEY, BENNETT, GUST, SMITH & ROSENFELD,
F.,
Attorneys for Defendants.

Filed Apr. 8, 1931. [48]

[Title of Court and Cause.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, that we, H. L. Mosher, as principal, and John R. Scaife, Paul J. Benson, sureties, all of the City of Phoenix, are held and firmly bound unto the above-named City of Phoenix in the sum of Two Hundred Fifty Dollars, to be paid the said City of Phoenix, for the payment which well and truly to be made we bind ourselves, and each of us, our and each of our heirs, executors, administrators jointly and severally by these presents.

Sealed and signed this —— day of April, 1931.

Whereas the above-named H. L. Mosher has prosecuted an appeal to the United *Stat* Circuit Court of

Appeals, Ninth Circuit, to reverse the judgment and decree rendered in the above-entitled suit by the District Court of the United States for the District of Arizona.

Now, therefore, the condition of this obligation is such that if the above-named H. L. Mosher shall prosecute said appeal to effect and answer such damages and costs, if *he* fail to make said appeal good, then this obligation shall be null and void; otherwise the same to be and remain in full force and effect.

H. L. MOSHER.
J. R. SCAIFE.
P. J. BENSON.

Sealed and delivered and taken and acknowledged this —— day of April, 1931, before me.

_____.

Approved as to sureties, April ——, 1931.

_____. [49]

[Title of Court.]

AFFIDAVIT OF JOHN R. SCAIFE AND PAUL J. BENSON.

State of Arizona,
Maricopa County.

The *affidavts* John R. Scaife and P*ua*l J. Benson, each for himself and one for the other, upon their oaths say: that they and each of them are worth, over and above their exemptions and liens thereon, real estate in the State of Arizona, the sum of two

hundred and fifty dollars and more, the penal sum in the bond signed by them as sureties for H. L. Mosher to prosecute an appeal to the United States Circuit Court of Appeals, Ninth Circuit, from that certain judgment and decree rendered herein.

JOHN R. SCAIFE.
P. J. BENSON.

Subscribed and sworn to before me by J. R. Scaife and Paul J. Benson, each for himself, this April 30*st*, 1931.

[Seal] RACHAEL ROBINSON.
My com. expires: 1/27/34.

Filed May 1, 1931. [50]

[Title of Court and Cause.]

ORDER FOR RECORD ON APPEAL.

The Clerk of the District Court will copy and certify to the Circuit Court of Appeals, for the appeal herein, the entire record, except the summons and any briefs or memorandum of authorities filed.

JOHN W. RAY,
For Plaintiff.

Filed May 1, 1931. [51]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO AND INCLUDING JUNE 10, 1931, TO FILE RECORD AND DOCKET CAUSE ON APPEAL.

It appearing to the court that Clerk of this court

will be unable to prepare the record in this case and return and file same with the Clerk of the Circuit Court of Appeals for the Ninth Circuit at San Francisco within the time fixed, May 7th, 1931, that being the return day of the citation heretofre issued,—

Now, therefore, for good cause shown, IT IS HEREBY ORDERED that the time to file the record in this case and to docket the same with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit and the return day of said citation be and the same is enlarged and extended to and including the tenth day of June, 1931.

Done in open court May 7th, 1931.

F. C. JACOBS,
Judge U. S. Dist. Court.

Filed May 7, 1931. [52]

[Title of Court.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Arizona,—ss.

I, J. Lee Baker, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said court, including the records, papers and files in the case of H. L. Mosher, Plaintiff, *versus* City of Phoenix, Defendant, numbered E.-189—Phoenix, on the docket of said court.

I further certify that the attached pages, numbered 1 to 53, inclusive, contain a full, true and correct transcript of the proceedings of said cause and all the papers filed therein, together with the endorsements of filing thereon, called for and designated in the praecipe filed in said cause and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk, in the City of Phoenix, State and District aforesaid.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of $9.45 and that said sum has been paid to me by counsel for the appellant.

I further certify that the original citation issued in the said cause is hereto attached and made a part of this record.

WITNESS my hand and the seal of the said court this 12th day of May, 1931.

[Seal] J. LEE BAKER,
Clerk. [53]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America—To City of Phoenix, a Municipal Corporation, Defendant, GREETING:

You are hereby cited and admonished to be and appear at the Circuit Court of Appeals of the United States, to be holden in the City of San Francisco, California, on the seventh day of May, 1931,

pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the District of Arizona, in Phoenix, Arizona, wherein H. L. Mosher is appellant and City of Phoenix, a municipal corporation, is respondent, to show cause, if any there be, why the judgment of dismissal in said appeal mentioned should not be corrected and speedy justice done to the parties on that behalf.

WITNESS, the Hon. FRED. C. JACOBS, Judge of the United States District Court, this April 7th, 1931.

[Seal] F. C. JACOBS,
Judge United States Dist. Court. [54]

Filed Apr. 8, 1931. [55]

[Endorsed]: No. 6471. United States Circuit Court of Appeals for the Ninth Circuit. H. L. Mosher, Appellant, vs. City of Phoenix, a Municipal Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Arizona.

Filed May 20, 1931.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6471

United States

Circuit Court of Appeals

For the Ninth Circuit.

H. L. MOSHER,

Appellant,

vs.

CITY OF PHOENIX, a Municipal Corporation,

Appellee.

Upon Appeal from the District Court of the United States for the District of Arizona.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October term, A. D. 1931, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Friday, the thirtieth day of October, in the year of our Lord one thousand nine hundred and thirty-one. Present: The Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding; Honorable WILLIAM H. SAWTELLE, Circuit Judge; Honorable WILLIAM P. JAMES, District Judge.

[Title of Cause.]

ORDER GRANTING APPLICATION FOR LEAVE TO FILE NEW BOND AND SUBMITTING CAUSE.

ORDERED motion of appellee to dismiss appeal in above cause argued by Mr. John L. Gust, counsel for the appellee, and in support of said motion, and by Mr. John W. Ray, counsel for the appellant, and in opposition to said motion.

Upon consideration thereof, and of the application of appellants, this day filed, for approval of the bond in above cause, or for an order permitting the District Court to approve such bond, or for leave to file a new bond in above cause, IT IS ORDERED that the said motion to dismiss be, and hereby is denied, and that the application of appellant be, and hereby is granted, and that Mr. John W. Ray, counsel for appellant, be, and hereby is

granted leave to file new bond in above cause in the sum of Two Hundred and Fifty Dollars ($250.00) said bond to be approved by the District Judge of the District of Arizona and filed with the Clerk of the said District Court of Arizona within ten days from date, and a certified copy of said bond to be sent to the Clerk of this court.

FURTHER ORDERED cause on merits argued by Mr. John W. Ray, counsel for appellant, and by Mr. John L. Gust, counsel for appellee, and submitted to the Court for consideration and decision.

United States Disyrict Court, District of Arizona.

No. E.–189—Phx.

H. L. MOSHER,

Plaintiff,

vs.

CITY OF PHOENIX, a Municipal Corporation,

Defendant.

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, that we, H. L. Mosher, as principal, and John R. Scaife and M. M. Toncray, as sureties, all of the city of Phoenix, Maricopa County, are held and firmly bound unto the above-named City of Phoenix, in the sum of Two Hundred and Fifty Dollars, for the payment of which, well and truly to be made to the City of Phoenix, we bind ourselves and each of use, our and each of our heirs, executors, and

administrators severally and jointly by these presents.

Signed and sealed this 5th day of November, 1931.

WHEREAS the above-named H. L. Mosher has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment and decree rendered in the above-entitled suit by the District Court for the District of Arizona,—

NOW, THEREFORE, the condition of this obligation is such that if the above-named H. L. Mosher shall prosecute said appeal to effect and answer such damages and costs, if she fail to make said appeal good, then this obligation shall be null and void; otherwise the same to remain in full force and effect.

H. L. MOSHER.
M. M. TONCRAY.
JOHN R. SCAIFE.

United States of America,
District of Arizona,—ss.

This instrument was acknowledged before me this 5th day of November, 1931, by H. L. Mosher, as principal, and M. M. Toncray and John R. Scaife, as sureties.

[Seal of U. S. Dist. Court.] J. LEE BAKER.
J. LEE BAKER,
Clerk United States District Court for the District of Arizona.

United States of America,
District of Arizona,—ss.

The affiants John R. Scaife and M. M. Toncray, upon their several oaths, each for himself and not one for the other, say: That he is worth in real estate situate in the state of Arizona, over and above all his debts and exemptions, the sum and amount of more than Two Hundred and Fifty Dollars, that sum being the amount of the above bond, which they sign as sureties of H. L. Mosher, principal, on appeal to the United States Circuit Court of Appeals, Ninth Circuit, from a judgment and decree in favor of the City of Phoenix.

JOHN R. SCAIFE.
M. M. TONCRAY.

Subscribed to and sworn to before me by John R. Scaife and M. M. Toncray, each for himself, this 5th day of November, 1931.

[Seal of U. S. District Court]

J. LEE BAKER.
J. LEE BAKER,
Clerk United States District Court, for the District of Arizona.

Approved: November 5, 1931.

F. C. JACOBS,
Judge, United States District Court, for the District of Arizona.

Filed Nov. 5, 1931. J. Lee Baker, Clerk United States District Court for the District of Arizona. By George A. Hillier, Deputy Clerk.

The United States District Court for the District of Arizona.

United States of America,
District of Arizona,—ss.

I, J. Lee Baker, Clerk of the United States District Court for the District of Arizona, do hereby certify that the above and foregoing is a true, perfect, and complete copy of bond on appeal in the case of E.-189—Phoenix, H. L. Mosher, Plaintiff, vs. City of Phoenix, a Municipal Corporation, Defendant, filed November 5, 1931, in the United States District Court for the District of Arizona, as the same appears from the original record remaining in my office.

WITNESS my hand and the seal of said court this 5th day of November, 1931.

J. LEE BAKER,
Clerk.
By Gladys West Smith.
Gladys West Smith,
Deputy.

[Endorsed]: Filed Nov. 7, 1931. Paul P. O'Brien, Clerk.

At a stated term, to wit, the October term, A. D. 1931, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the fourteenth day of December, in the

year of our Lord one thousand nine hundred and thirty-one. Present: The Honorable CURTIS D. WILBUR, Senior Circuit Judge; Honorable WILLIAM H. SAWTELLE, Circuit Judge; Honorable WILLIAM P. JAMES, District Judge.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREE.

By direction of the Court, ORDERED that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the Clerk and that a decree be filed in above cause and recorded in the minutes of this court in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION U. S. CIRCUIT COURT OF APPEALS.

Upon Appeal from the District Court of the United States for the District of Arizona.

Before WILBUR and SAWTELLE, Circuit Judges, and JAMES, District Judge.

WILBUR, Circuit Judge.—This is an action to enjoin the further prosecution of the improvement of Taylor Street from Central Avenue to Seventh Street in the City of Phoenix, Arizona. The juris-

diction of the United States District Court is predicated upon the allegation that a part of Taylor Street within the limits of the proposed improvements is the private property of the plaintiff; that this property consists of a strip of land along the north side of plaintiff's property from Central Avenue to First Street, having a width of about 12 feet, and a length of 305 feet, and a value of $25,000. It is claimed that the city is thus attempting to appropriate the private property of the plaintiff and deprive him of the use thereof without due process of law, in violation of plaintiff's right under the constitution of the United States.

An examination of the allegations of the plaintiff's complaint indicates there is a disagreement between the city of Phoenix and the appellant as to the width of the street. The appellant claims that the street is only 48 feet wide and that the owners thereof dedicated the same to the public, but that the remaining 12 feet thereof across the appellant's land has never been so dedicated by the owner thereof. It is apparent therefore that the controversy between the appellant and the city is as to the ownership of a strip of land.

If we have correctly interpreted the statutes of Arizona involved in this proceeding in Collins vs. City of Phoenix, No. 6470, this day decided, the proceedings for the improvement of the private property of the appellant were not authorized by the statutes of Arizona under which the proceedings were instituted. The appellant alleges in her

complaint that the proceedings initiated for the improvement of this street were void under the law of Arizona. As was said in Memphis vs. Cumberland Telephone Co., 218 U. S. 624:

> "The bill, therefore, so far from charging a violation of the Fourteenth Amendment by an authorized action of the State, distinctly and in terms avers that the ordinance was passed without state authority."

See, also, San Francisco vs. United R. R. Co., 190 F. 507, 512; Toncray vs. City of Phoenix, 47 F. (2d) 448; McCain vs. Des Moines, 84 F. 728, affirmed by the Supreme Court of the United States, id., 174 U. S. 168, 177. The appellant does not present a real and substantial federal question. 1 Cyc. Federal Procedure, § 69, p. 353; Postal Telegraph Co. vs. Noland, 240 F. 754; Silvey vs. Montgomery County, 273 F. 202.

Decree affirmed.

[Endorsed]: Opinion. Filed Dec. 14, 1931. Paul P. O'Brien, Clerk.

Referred to in opinion in Mosher vs. City of Phoenix, No. 6471.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6470.

J. D. COLLINS,

Appellant,

vs.

CITY OF PHOENIX, a Municipal Corporation, and SCHMIDT-HITCHCOCK CONTRACTORS, a Corporation,

Appellees.

Appeal from the District Court of the United States for the District of Arizona.

Before WILBUR and SAWTELLE, Circuit Judges and JAMES, District Judge.

WILBUR, Circuit Judge.—This is an appeal from judgment of dismissal given upon a motion to dismiss the complaint for lack of sufficient facts to justify the relief prayed for. The appellant predicating jurisdiction upon a diversity of citizenship brought this action in equity in the United States District Court for Arizona to enjoin the further improvement of First Street between Van Buren and McDonald Road in the city of Phoenix, under proceedings thereto instituted by the city authorities of Phoenix by resolution No. 5065, and to enjoin the contractor to whom the performance of the street work therein specified had been let from proceeding with the work. Appellant claims

that the proceedings are void for certain defects enumerated in the bill. The court had previously denied a motion for an interlocutory injunction and from this order an appeal was taken to this court, and decided in Collins vs. City of Phoenix, 26 F. (2d) 753, 754. Appellant also petitioned the Supreme Court for a writ of mandamus to compel the calling in of two additional judges to sit with the District Judge in this case. This application was denied. Ex parte Collins, 277 U. S. 565.

The general nature of the proceedings for improving the streets under the law of the state of Arizona, effective in the city of Phoenix, is briefly stated in our previous opinion (Collins vs. City of Phoenix, *supra*). We will endeavor to dispose of the numerous points urged by the appellant as briefly as may be.

Appellant is the owner of a block of land fronting upon the proposed improvement. The proceedings were initiated by resolution No. 5065 enacted in pursuance of the provisions of Revised Statutes of Arizona T. 7, ch. 12, and the Bond Act, Arizona Statutes 1919, ch. 144. The first contention is that these legislative acts of Arizona do not apply to the city of Phoenix. The charter of the city of Phoenix provides that the legislative body thereof can adopt the laws of the state of Arizona in force at the time of the improvement and that when it does so the state statute is in force in Phoenix (charter of Phoenix, ch. 4, § 2, sub. 45), and it is conceded by the appellant that by appropriate action the city could adopt and apply this state law. It is con-

tended, however, that it has not done so. The charter provision referred to is in part as follows:

> "Wherever in the judgment of the commission, or of the people, the cost and expense of any of the foregoing improvements is to be paid by special assessment on private property, the laws of the state of Arizona in force at the time of the improvement shall govern and control, and all proceedings shall be in conformity therewith * * * ".

Appellant says:

> "By resolution 5065, it is declared that the city intends to enact certain legislation concerning street improvement on First Street. * * * It is, what it pretends to be, a notice of intention to enact legislation. A notice that we will enact legislation adopting certain procedure contained in the Civil Code."

The point seems to be that this resolution of intention cannot be deemed to be a judgment or determination of the commission that the expense of the improvements should be paid by special assessment because objections might be made to the improvements, the protest might be sustained, the extent of the district might be altered, etc.

The next point is diametrically opposed to that just discussed, for it is claimed that the resolution of intention passed by the city is not really a resolution of intention. It is stated:

> "An examination of resolution No. 5065, the so-called resolution of intention, discloses

that it creates an assessment district and orders the work done and nowhere provides for a time or place when objections may be made or protests filed. It is true that the title of the resolution recites, 'A resolution of the Commission of the City of Phoenix declaring its intention to improve certain portions of First street, etc.' "

Section 2 of the ordinance is then quoted to the general effect that it is the opinion of the commission that the contemplated work is of more than local or ordinary public benefit, and that the said commission "hereby makes the costs and expenses of said work of improvement chargeable upon a district and hereby declares that the district in said city of Phoenix benefited by the said work or improvement, and to be assessed to pay the costs and expenses thereof, in proportion to the benefits," etc., is as thereinafter described.

Appellant states:

> "This is not a resolution of intention to do. It is a declaration by the legislative body that we have acted on this legislation and direct the improvement to be made."

It is clear, we think, that the resolution of intention is a sufficient declaration of the judgment of the commission within the meaning of the charter to make effective the state law within the city of Phoenix as it relates to this improvement. As to the contention that such a conclusion converts the so-called resolution of intention from a resolu-

tion of intention into an ordinance ordering the work to be done, we think it sufficient to say that the resolution of intention is characterized as a resolution of the Commission "declaring its intention to improve certain portions of First Street in the City of Phoenix, and determining that improvement bonds shall issue to represent the costs and expenses thereof." Section 1 of the act declares it the intention of the Commission of the city of Phoenix to order the work to be done. Section 2 provides that the assessment shall be chargeable on a district therein described. Section 3 provides for the issuance of bonds therefor under the state statutes which are therein referred to. Section 4 provides for the posting of notices of the proposed improvement and that the city clerk shall certify to the passing of a resolution of intention and cause it to be published, etc. These are the usual provisions of a resolution of intention.

Appellant cites Cooper vs. City of Bozeman, 169 Pac. 801, by the Supreme Court of Montana; Shapard vs. Missoula, 141 Pac. 544, and Hinzeman vs. City of Deer Lodge, 193 Pac. 396, as supporting the proposition that this is not a resolution of intention, but they do not do so.

We are not certain that we have apprehended appellant's point for the reason that the discussion takes rather a broad range. We have taken the view that the appellee takes of this proposition, namely, that it is contended that the Commissioners of Phoenix did not act in such fashion as to adopt

the state law as the basis for its assessment of the costs of the improvement. As we have pointed out the resolution of intention expressly refers to the statutory law and determines the cost of the improvement should be assessed upon the property benefited. This under the provisions of the charter hereinabove quoted is a sufficient adoption of the statutory method of procedure.

The next specification of appellant's brief is entitled "Objection B." The point herein made is that § 525 of the Civil Code of Arizona adopted in 1928 which provides that the superintendent of streets shall assess the entire cost of work, including incidental expenses against the lots in the assessment district, is in violation of the constitution of Arizona, Art. 9, sec. 6, which authorizes the state legislature to give power to incorporated cities, towns and villages "to make local assessments, or by special taxation of property benefited." The point is that a law which requires the total cost of the improvements to be assessed in a district to be benefited violates the constitution which confines the amount of the assessment to the amount of the benefits. The argument is that the total benefits may not be as great as the total cost. To further illustrate the nature of the point made by the appellant, we cite the cases to which he calls our attention: Greely vs. People, 60 Ill. 19; Chicago vs. Adcock, 168 Ill. 221, 48 N. E. 155; Dexter vs. Boston, 176 Mass. 247; 57 N. E. 379; White vs. Gove, 183 Mass. 333; 67 N. E. 359; Detroit vs. Chopin, 112 Mich. 588, 71 N. W. 149;

Adams vs. Shelbyville, 154 Ind. 467; 57 N. E. 114; Walsh vs. Barron, 55 N. E. 164; 61 Ohio St. 15; Kettle vs. Dallas, 35 Tex. Civ. Ap. 632; 80 S. W. 874; Smith vs. Omaha, 49 Neb. 883; 69 N. W. 402; Norwood vs. Baker, 172 U. S. 269. This question has been so often considered by the courts that it does not merit consideration in a case where the area of the district is determined by the proper legislative body after an opportunity to object to the inclusion or exclusion of territory benefited. Without discussion or further citation we call attention to the numerous cases cited to the notes on Norwood vs. Baker, 172 U. S. 269, in Rose's notes, Vol. 18, pp. 102, 112, and supplement to Rose's notes, Vol. 3, pp. 1007, 1008, 1009. See discussion of the general subject in my dissent in City of San Diego vs. A. T. & S. F., 45 F. (2d) 11, 13, 16, and decision of this court in Northwestern Pac. R. R. vs. Town of Larkspur, 36 F. (2d) 554, 556.

The next objection specified by the appellant is that the incidental expenses of doing the work are to be added to the assessment therefor in the first instance by the Superintendent of Streets. It is claimed that the Superintendent of Streets is not qualified to pass upon his own accounts in making the assessments. This is the almost universal method of making such assessments, and the right of appeal to the local legislative body from the assessment of the Superintendent of Streets is the remedy for the correction of any error in that regard.

The next specification of error is that the city of

Phoenix has exceeded its limit of indebtedness and that without a vote of the people an expense is created in the form of incidentals that cannot properly be incurred by the city. The appellant does not allege that there is not money amply sufficient to pay these expenses from the treasury from the current revenue. This is not an incurred indebtedness, within the meaning of the constitutional provision cited by the appellant. (Citing 6 McQuillin Mun. Corp., § 734, p. 28, 2d ed., p. 34, § 2378.) See also San Francisco Sulphur Co. vs. Contra Costa Co., 207 Cal. 1.

The next objection is that the resolution ordering work, No. 5078, was not published at all. It is conceded that the statute does not require it to be published. It expressly so states:

> "No publication or notice other than that provided for in this chapter shall be necessary to give validity to any of the proceedings provided for therein."

Appellant contends notwithstanding this express provision of the statute that the charter provision requiring publication of resolutions and ordinances must be construed with that statute and that taken together the ordinance must be published as required by the charter. The case of Barber Asphalt Co. vs. Costa, 171 Cal. 138, is cited in support of this proposition. Also Los Angeles vs. Central Trust Co., 173 Cal. 323; Loop Lbr. Co. vs. Van Loben Sels, 173 Cal. 228; Storke vs. Santa Barbara, 244 Pac. 158.

The charter dealt with in the case of the city of San Jose, California, cited by appellant (Barber Asphalt Co. vs. Costa, 171 Cal. 138), depends upon an entirely different situation. There the charter was made supreme over the state law. There the general law was adopted only "where not inconsistent with the express provisions of the charter." (See Ransome-Crummey Co. vs. S. F. Bennett, 177 Cal. 560, dealing with the same charter.) See also Smith vs. Lightston, 186 Pac. 769.

The Supreme Court of Arizona in the case of Amish vs. Phoenix, 36 Ariz. 21, 282 Pac. 42, seems to settle this question in principle so far as the city of Phoenix is concerned. It was therein held that the provisions of the charter, contrary to the state law, do not control with reference to the execution of contracts for the paving of streets by special assessment under provisions of the state law adopted by the Commissioners of the city of Phoenix for the purposes of such improvement. It is there said:

> "A provision of this nature is valid as an adoption of the state law for the purpose intended. Buntman vs. City of Phoenix, 32 Ariz. 18, 255 Pac. 490. Since the contract was executed as provided by the statute, the third assignment is without merit."

The next specification of error in that inasmuch as the street improvement proceedings involve the issuance of bonds or special assessments, the constitution for the state of Arizona, Art. 7, § 13, provides that the matter must be submitted to the

taxpayers. This matter has been decided by the Supreme Court of the state of Arizona, adversely to the appellant's contention. Ainsworth vs. Paving Co., 18 Ariz. 243.

Specification, objection I, of appellant's brief, is predicated on the theory that the size of the assessment district and the inclusion therein of property fronting upon the street, but not upon the paved portions thereof, was for the fraudulent purpose of preventing the plaintiff from exercising the statutory power of protest, which in the event that 50 per cent of the frontage affected objected to the improvement would deprive the Commission of jurisdiction to proceed with the improvement. It should be noted in the first place that this position is entirely inconsistent with objection B. That is to say, in objection B, *supra,* it is contended that the city Commission had no power to make the total assessment chargeable upon the property in the district. This, of course, is based upon the claim that all of the property benefited is not included in the district, consequently, it is claimed the total cost of the improvement is to be imposed upon less property than is actually benefited. The claim here is that the inclusion of other property fronting along the street was improper because of the fraudulent intent on the part of the said Commission to forestall an effective veto by the property owners in that by including more property in the district than actually fronted on the improvement they deprived the property holders fronting on the pavement of the veto

power which they could otherwise have exercised in the event the entire cost had been placed upon their property by excluding the other property from the assessment district. Of course this inconsistency of the appellant's position does not solve the problem presented by the objections. The first objection (I) we have already disposed of as untenable. It is certainly a novel proposition for a property holder to object to the inclusion within the taxable district of property which is thereby required to bear a part of the burden which would otherwise fall upon him. The law is that the size of the assessment district is to be determined by the legislative body under the laws of Arizona subject to the right of the property holders to be heard as to the size of the district, and to a readjustment of the boundary lines of the assessment district after the hearing of the property holders interested therein. As this point has been so often and so thoroughly settled, we content ourselves with citation of the statutes of Arizona and the decisions of that state and others upon the subject; Pars. 1927, 1954, 1955, 1960, Rev. Stat. 1913, Civil Code of Arizona; Bates vs. Twist, 70 Pac. 1023; Roberts vs. Phoenix, 25 Ariz. 466, 471; Phoenix vs. Southwest Flour & Feed Co., 31 Ariz. 219; 250 Pac. 1060.

The real point to appellant's objection is that by increasing the size of the district more frontage was introduced within the district, and the property holders more vitally interested by reason of the fact that the improvement was in front of their property were thereby prevented from effectively pro-

testing against the entire improvement. It is claimed that this plan was concocted with the fraudulent view of preventing this protest and that it is the intention of the Superintendent of Streets, when the time comes to make the assessment, to place a nominal assessment against all the lots other than the property of appellant and other fronting upon the major portion of the improvement. With reference to this proposition it should be said that while the appellant did protest against the improvement, and his protests were overruled, he did not protest or file objections to the size of the district. The remedy for any injustice in regard to the size of the district was in the first instance at least, by an application to the city Commission for change of the boundaries thereof. This was not done, and for that reason such objection may not now be made the basis of an action of the court in equity. The appellant has not pursued his legal remedies and is therefore in no position to invoke the powers of a court of equity to secure the relief which he might have secured by appropriate appeal to the Commission. Neither the allegation that the Commission had acted fraudulently, nor the claim that they intend to carry out the fraud, justify the interposition of a court of equity at this time. The allegation that the Superintendent of Streets intends to violate the law in the making of an assessment for an improvement which appellant seeks to prevent is, to say the least, premature, particularly in view of his right of appeal from such assessment. Appellant cannot invoke the powers of a court of

equity until he has exhausted his legal remedies in an effort to secure a fair assessment, and these legal remedies include those provided by the law for the improvement of streets here in question. San Francisco Sulphur Co. vs. Contra Costa Co., 207 Cal. 1, 7; Teeter vs. City of Los Angeles, 290 Pac. 11; Oak Hill vs. Gillett, 13 Cal. App. 605; Ainsworth vs. Paving Co., 18 Ariz. 243, 158 Pac. 428; City of Globe vs. Willis, 16 Ariz. 378, 146 Pac. 544; and by this court on the former appeal in this case, Collins vs. City of Phoenix, 27 Fed. 753, 754, *supra.*

The point is without merit.

The next objection, specification G, is that the proceedings are violative of Sec. VIII of Art. IX of the constitution of Arizona, which requires that every law which imposes a tax shall state the tax and the object for which it shall be applied, "and it shall not be sufficient to refer to any other law to fix such tax or object." It is sufficient to say that the ordinance ordering work in this case does not impose a tax within the meaning of the constitution of Arizona referred to, nor is the assessment proposed such a tax. We think it is unnecessary to cite any authority upon this subject as the point is too well established in this type of proceeding to merit discussion. We refer, however, to 5 McQuillin Mun. Corp., § 2165, p. 570. The case cited by the appellant in support of his contention, Trobridge vs. City of Detroit, 68 N. W. 402, is not applicable to proceedings of municipal corporations for improvement of streets.

The specification, objection H in appellant's brief,

is of a more serious character. Appellant alleges that a portion of the street ordered improved by the legislative authority of the city of Phoenix is not and never was a public street, "that it is a private easement and right of way created by deed of record." One claim of appellant is that the taking of a private easement to improve it as a street would be a taking of property without due process of law, but he is not in a position to make that complaint, as he does not claim to own the property alleged to be so taken. The real question involved is whether or not the city can assess the costs of improving private property upon the appellant's property. As appellant states it:

> "The city does propose to take plaintiff's property, his assessment, to pay the costs and expenses of improving the private property of another."

The answer of the appellee to this contention is twofold. It is first claimed that under Revised Code of 1928, § 550, the city Commissioners were authorized to improve any street "now open," and that although the street is a private easement it can be so improved as a street as it is clear from the allegations of the complaint that this street is "now open." The statute, (§ 550, Rev. Code of Arizona 1928) referred to, defines a "street" as follows:

> "Avenues, alleys, highways, lanes, crossings, intersections, courts, places and grounds now open or dedicated, or hereafter opened or dedicated to public use."

The law in force at the time these proceedings were instituted on that subject was paragraph 1953, R. S. of Arizona, 1913.

> "All streets, lanes, places, alleys, courts, avenues, boulevards, highways, crossings, intersections and public ways in the municipalities of this state, now open or dedicated, or which hereafter may be opened or dedicated to public use, shall be deemed to be held open public streets," etc.

Appellees cite no decision of the Supreme Court of Arizona construing this statute. While we are, therefore, loath to attempt a construction of the statute we think it is clear that this statute would not justify the legislative authority of the city in improving property which, although for some reason, open or used for public street, did not belong to the public. Such a private way would not be a "public street" within the meaning of the statute. The opening of a street is usually held to be an offer to dedicate it to the public. In order to complete the dedication and constitute the open street a public street there must be an acceptance of the proposed dedication. This may usually be implied from mere user thereof by the public. If a street were open with the knowledge and consent of the owner and after such opening the authorities of the city enacted ordinances for its improvement, their enactment would, we think, constitute an acceptance of the dedication and *ipso facto* constitute the street a public street. See San Francisco S. Co. vs. Contra Costa Co., 207 Cal. 1, 6, *supra.* The Arizona

statute above quoted (Par. 1953, R. S. Ariz. 1913) is taken bodily from the Vrooman Act of California (Stats. Cal. 1885, p. 147, § 1).

The attempt to improve private property under the Vrooman Act of California has been uniformly held unlawful under the Street law of California. Assessments to pay for such improvements are void. (Spaulding vs. Bradley, 79 Cal. 449; Spaulding vs. Wesson, 115 Cal. 441; Bou vs. Willits, 61 Cal. App. 32.) The legislature of California has attempted to meet the situation arising from many defective dedications and acceptances of streets by providing that if title is made to the street before a judicial determination of the invalidity of the assessment the assessment is not invalidated by the delay in the acquisition of the title to the street. (See decision of the California Supreme Court in Rice vs. Town of Los Gatos, Oct. 31, 1930, 80 Cal. Dec. 519.)

The authorization of the legislature of Arizona to improve all streets "now open" would no doubt operate as an acceptance by the public of any such streets theretofore opened for public use, but in the teeth of the allegation that First Street in Phoenix is a private right of way and not a public street, it cannot be assumed that the street is a public street even if it is "now open." We may suspect that there has been a dedication and an acceptance of the street, but the ultimate fact is ownership, and that is expressly alleged to be private and not public.

It has been held in other jurisdictions that the expense of improving private property cannot be

assessed upon other private property. Leavenworth vs. Laing, 6 Kan. 274; Culver vs. Yonkers, 80 N. Y. S. 1034; Spier vs. New Utrecht, 121 N. Y. 420; Lorenz vs. Armstrong, 3 Mo. App. 574; In re Rhineland, 68 N. Y. 105; Reiff vs. City of Portland, 71 Or. 421; Smith vs. Smythe, 197 N. Y. 457. For this reason the court erred in sustaining the motion to dismiss the complaint.

Decree reversed.

[Endorsed]: Opinion. Filed Dec. 14, 1931. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 6471.

H. L. MOSHER,

Appellant,

vs.

CITY OF PHOENIX, a Municipal Corporation,

Appellee.

DECREE U. S. CIRCUIT COURT OF APPEALS.

Appeal from the District Court of the United States for the District of Arizona.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Arizona, and was duly submitted.

On consideration whereof, it is now here ORDERED, ADJUDGED, AND DECREED by this

Court, that the decree of the said District Court in this cause be, and hereby is, affirmed, with costs in favor of the appellee and against the appellant.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by this Court that the appellee recover against the appellant for its costs herein expended, and have execution therefor.

[Endorsed]: Decree. Filed and entered Dec. 14, 1931. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

ORDER STAYING ISSUANCE OF MANDATE.

Upon application of Mr. John W. Ray, counsel for the appellant, and good cause therefor appearing, IT IS ORDERED that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including February 15, 1932; and in the event the petition for a writ of certiorari to be made by the appellant herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

CURTIS D. WILBUR,
United States Circuit Judge.

Dated: San Francisco, California, January 12, 1932.

[Endorsed]: Filed Jan. 12, 1932. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing eighty-two (82) pages, numbered from and including 1 to and including 82 to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 8th day of February, A. D. 1932.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 11, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted, limited to the question of the jurisdiction of the District Court as a Federal court.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.